U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0381 BLA

RONNIE L. BOLT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK KENTUCKY MINING	)	DATE ISSUED: 04/28/2016
	)	
and	)	
	)	
ISLAND CREEK COAL COMPANY c/o WELLS FARGO DISABILITY MANAGEMENT	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Adele H. Odegard, Administrative Law Judge, United States Department of Labor.

George E. Roeder, III (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2012-BLA-05149) of Administrative Law Judge Adele H. Odegard, rendered on a subsequent claim[1] filed on June 24, 2010, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge determined that claimant established twenty-seven and one-half years of coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(b). Based on these determinations and the filing date of the claim, the administrative law judge found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012),[2] and also demonstrated a change in an applicable condition of entitlement under 20 C.F.R. §725.309. The administrative law judge further found that employer did not establish rebuttal of the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in requiring employer to "rule out" the existence of pneumoconiosis, and did not properly weigh the medical opinions in considering whether employer established rebuttal of the Section 411(c)(4) presumption. Claimant has not responded to employer's appeal. The Director,

[1] Claimant filed an initial claim for benefits on November 10, 1993, which was denied by the district director on April 14, 1994, because claimant failed to establish any of the requisite elements of entitlement. Director's Exhibit 1. Claimant filed a second claim for benefits on April 21, 1995, which was denied by Administrative Law Judge James W. Kerr, Jr. on September 9, 1997, because the evidence was insufficient to establish the existence of pneumoconiosis. Director's Exhibit 2. Claimant filed a third claim for benefits on July 2, 2001, which was denied by the district director on May 2, 2003, because claimant failed to establish total disability. Director's Exhibit 3. Claimant took no further action until he filed this subsequent claim.

[2] Under Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

Office of Workers' Compensation Programs, has declined to file a brief, unless specifically requested to do so by the Board.[3]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to rebut the presumption of total disability due to pneumoconiosis under Section 411(c)(4), employer must affirmatively establish that claimant does not have either legal[5] or clinical[6] pneumoconiosis, or that "no part of [claimant's] respiratory or

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established twenty-seven and one-half years of qualifying coal mine employment, a totally disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(b)(2), invocation of the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4), and a change in an applicable condition of entitlement under 20 C.F.R. §725.309. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 8-9, 15, 27.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, because claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 22 n.30; Director's Exhibits 2, 3, 5.

[5] Legal pneumoconiosis includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The regulation also provides that "a disease 'arising out of coal mine employment' includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or *substantially aggravated by*, dust exposure in coal mine employment." 20 C.F.R. §718.201(b) (emphasis added).

[6] Clinical pneumoconiosis is defined as:

> [T]hose diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis,

pulmonary total disability was caused by pneumoconiosis as defined in §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Minich v. Keystone Coal Mining Corp*., 25 BLR 1-149, 1-150 (2015) (Boggs, J., concurring and dissenting).

The administrative law judge found that employer disproved the existence of clinical pneumoconiosis by a preponderance of the x-ray evidence and based on the medical opinion evidence, as Drs. Rasmussen, Zaldivar, and Castle agree that claimant does not have clinical pneumoconiosis. Decision and Order at 18, 23. In considering whether employer disproved the existence of legal pneumoconiosis, the administrative law judge rejected the opinions of employer's physicians, Drs. Zaldivar and Castle, that claimant suffers from a disabling obstructive respiratory impairment caused by smoking-related asthma and emphysema, and unrelated to coal dust exposure.[7] *Id*. at 20-26. Specifically, the administrative law judge found that the opinions of both physicians were "contrary to the regulations, conclusory, and [fail] to explain why coal mine dust exposure could not be a co-contributing factor" in claimant's disabling obstructive respiratory impairment. *Id*. at 24-26.

Employer asserts that the administrative law judge did not properly analyze whether the medical opinions were sufficient to disprove the existence of legal pneumoconiosis, as defined at 20 C.F.R. §718.201. Employer argues that the administrative law judge erred by requiring its experts to "rule out" or find that "no part" of claimant's impairment was due to coal mine dust. Employer's Brief in Support of Petition for Review at 13-14, 22-23. Employer states that the "rule out standard applies only to attempts to disprove the presumed connection between pneumoconiosis and disability." *Id*. at 14 (internal quotations omitted). Employer maintains that this case must be remanded for application of the correct rebuttal standard.

> massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1).

[7] Additionally, the administrative law judge found that Dr. Rasmussen's opinion diagnosing legal pneumoconiosis was not well-reasoned. Decision and Order at 23-24; Director's Exhibit 14; Employer's Exhibit 1.

We agree with employer that the administrative law judge did not clearly set forth the proper rebuttal standard, to the extent that her rebuttal analysis somewhat blends the standards for disproving legal pneumoconiosis and disability causation. *See* Decision and Order at 15-16, 20-26. The administrative law judge's error, however, does not require remand. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). The administrative law judge considered the explanations given by Drs. Zaldivar and Castle for why *they* each excluded a diagnosis of legal pneumoconiosis, and she ultimately concluded that their opinions were not credible on the etiology of claimant's disabling respiratory impairment. Thus, the administrative law judge determined that employer was unable to disprove the existence of legal pneumoconiosis and rebut the presumption of disability causation, based on the *credibility* of the evidence, and not on her application of a particular rebuttal standard. *See Minich*, 25 BLR at 1-156; Decision and Order at 20-26.

Employer further contends that the administrative law judge's credibility findings with respect to Drs. Zaldivar and Castle are not rational. We disagree. When considering Dr. Zaldivar's opinion, the administrative law judge fully discussed Dr. Zaldivar's explanations for why claimant's disabling obstructive respiratory impairment is due entirely to cigarette smoking. *See* Decision and Order at 20-21, 24-25; Director's Exhibit 15; Employer's Exhibit 6. The administrative law judge accurately noted that "Dr. Zaldivar supported his conclusion that [c]laimant's impairment is due to smoking by stating that [c]laimant had a carboxyhemoglobin level consistent with a current smoker." Decision and Order at 24. Contrary to employer's contention, the administrative law judge acted within her discretion in finding that "[p]resuming that [c]laimant in fact continued to smoke at the time of Dr. Zaldivar's exam, Dr. Zaldivar's opinion fails to explain why coal mine dust could not have *contributed* to [c]laimant's obstructive lung disease." *Id*. at 24-25 (emphasis added); *see* 20 C.F.R. §718.201(b); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013) (Niemeyer, J., concurring); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

In addition, the administrative law judge observed correctly that Dr. Castle opined that claimant does not have legal pneumoconiosis, in part, because claimant's objective tests did not demonstrate any restrictive respiratory impairment, only an obstructive respiratory impairment. Decision and Order at 21-22, 24-25; Employer's Exhibits 3, 7. Specifically, Dr. Castle indicated that the "physiologic studies have demonstrated a progressive degree of airway obstruction" in this case. Employer's Exhibit 3 at 19. In the same discussion, Dr. Castle noted that coal workers' pneumoconiosis "typically causes a mixed, irreversible obstructive and restrictive ventilatory defect. That was not a finding in this case." *Id*. at 19-20. The administrative law judge accurately stated that

the "regulations clearly define legal pneumoconiosis as including, but not limited to, 'any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.'" Decision and Order at 24, *quoting* 20 C.F.R. §718.201(a)(2). Therefore, the administrative law judge rationally found that, "[a]lthough Dr. Castle acknowledged that pneumoconiosis can cause an obstructive impairment, his opinion is based on the idea that pneumoconiosis must cause some degree of a restrictive impairment," and therefore it is "contrary to the premise that pneumoconiosis includes any obstructive [or] restrictive lung disease." *Id*. at 25; *see Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 321, 25 BLR 2-255, 2-260 (4th Cir. 2013); *Dante Coal Co. v. Jones*, 164 F. App'x 338, 347 (4th Cir. 2006); *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. Furthermore, the administrative law judge permissibly concluded that "like Dr. Zaldivar, Dr. Castle attributed [c]laimant's fixed obstructive impairment to tobacco induced emphysema and lung remodeling caused by untreated asthma," but that he did not adequately explain his basis for completely excluding claimant's coal mine dust exposure history. Decision and Order at 25; *see* 20 C.F.R. §718.201(b); *Owens*, 724 F.3d at 558; *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

As the trier-of-fact, the administrative law judge has discretion to assess the credibility of the medical opinions, based on the explanations given by the experts for their diagnoses, and assign those opinions appropriate weight. *See Cochran*, 718 F.3d at 323, 25 BLR at 2-257-58; *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 315-16, 25 BLR 2-115, 2-130 (4th Cir. 2012). The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that employer failed to disprove the presumed fact of legal pneumoconiosis, based on the opinions of Drs. Zaldivar and Castle, and that employer failed to rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i).[8] *See Bender*, 782 F.3d at 137; *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

[8] Because we affirm the administrative law judge's credibility determinations with regard to the opinions of Drs. Zaldivar and Castle on alternate grounds, it is not necessary that we address employer's argument that the administrative law judge erred in mischaracterizing Dr. Zaldivar's opinion, in finding that he expressed views contrary to the regulatory premise that pneumoconiosis is a latent and progressive disease. Similarly, we need not address employer's assertion that the administrative law judge misapplied the preamble to the 2001 revised regulations when rejecting Dr. Castle's opinion that asthma is not related to coal mine dust exposure. *See Kozele v. Rochester and Pittsburgh*

Finally, based on the administrative law judge's permissible determinations that the opinions of Drs. Zaldivar and Castle are not adequately reasoned regarding the cause of claimant's disabling respiratory impairment, and that they do not disprove the existence of legal pneumoconiosis, we affirm the administrative law judge's conclusion that they also fail to establish that "no part of [claimant's] pulmonary impairment was caused by pneumoconiosis," as defined at 20 C.F.R. §718.201. Decision and Order at 25; *see* 20 C.F.R. §718.305(d)(1)(ii); *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. We therefore affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption and we affirm the award of benefits.

Coal Co., 6 BLR 1-378, 1-382 n.4 (1983); Decision and Order at 24; Employer's Brief in Support of Petition for Review at 10-12, 18-20.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge